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No. 84-1182

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,
Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN, and
THE AIR FORCE OF
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

John D. Dillow
V. L. Woolston
Perkins, Coie, Stone, Olsen & Williams
1900 Washington Building
Seattle, WA 98101
(206) 682-8770
Counsel to Petitioners

12142

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STATEMENT TO COMPLY WITH RULE 28.1

Boeing and LSC have put a statement to comply with Rule 28.1 in their Petition for a Writ of Certiorari.

I. Iran Concedes That the Decision of the Court of Appeals Conflicts with 28 U.S.C. § 2107.

In their petition for a writ of certirorari, Boeing and LSC ask this Court to review a decision by the Ninth Circuit that clearly conflicts with the express language of 28 U.S.C. § 2107. Iran concedes that this conflict exists, but urges this Court to resolve the conflict in favor of the Ninth Circuit, on the theory that the express language of the conflicting statute has been supplanted by a more liberal court-made rule—Fed. R. App. P. 4(a)(5). The patent conflict between the Ninth Circuit's application of this Rule and the clear language of 28 U.S.C. § 2107 raises fundamental questions about the power of the federal judiciary to expand its jurisdiction beyond the limits expressly imposed by a congressionally enacted statute. The importance of this conflict makes it appropriate for resolution by this Court.

In its brief in opposition, Iran tries to minimize the importance of the conflict. At the same time, however, Iran is forced to acknowledge that the time limitations in Section 2107 have been described by this Court as "mandatory and jurisdictional." *See, e.g., Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978). Similarly, Iran must concede that the Federal Rules of Appellate Procedure may not "extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b).

Iran raises two arguments in an attempt to justify the Ninth Circuit's decision. First, Iran argues that the term "mandatory and jurisdictional," as used by the Supreme Court, should be construed to mean "mandatory" but *not* jurisdictional. Iran's primary support for this troubling assertion is a speculative passage in the treatise of Professor Moore.[1] Moore's opinions

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[1]In view of his prominent role on the Advisory Committee responsible for drafting and revising Rule 4(a)(5), it is perhaps not surprising that Professor

are not controlling in this matter, however. In *Schacht v. United States*, 398 U.S. 58 (1970) this court carefully distinguished the kinds of time requirements that are jurisdictional from those that are not. The Court held that "procedural rules adopted by the Court for orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64. According to the Court, such rules are to be distinguished from statutes that contain time limitations enacted by Congress.

> Nor do I find it at all anomalous that this Court on occasion waives the time limitations imposed by its own Rules and yet treats time requirements imposed by statute as jurisdictional. As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional.

Id. at 68 (Harlan, J., concurring).

Several legal commentators have also recognized this important distinction. *See* 16 C. Wright, A. Miller, *Federal Practice and*

Moore goes to great length in his treatise to reconcile the conflict between the rule and Section 2107 in a fashion that obscures the rule's constitutional infirmity. However, it is doubtful that Professor Moore would suffer the application of his treatise to support Iran's thesis that a jurisdictional statute can be overruled by an inconsistent court-made rule. In a section of the treatise not quoted by Iran, he makes a critical observation:

> The characterization "jurisdictional" is important, of course, in the interpretation of statutes, for a statute that is jurisdictional is not superseded by the rules.

9 J. Moore, *Moore's Federal Practice* ¶ 204.04 [2] at 4-16, n. 13 (2d ed. 1983).

Procedure 362-63 (1977) ("in civil cases where the time limitations for taking appeals and applying for certiorari are enunciated by Congress rather than by judicial rule, the Supreme court has consistently viewed compliance with the limitations as jurisdictional"); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 78 (1984) ("[w]hile it is at least conceivable that Congress would implicitly delegate to the judiciary the authority to modify or limit a substantive statutory right or a jurisdictional grant, it is absurd to imagine that Congress would implicitly grant the courts authority effectively to repeal such legislation."); J. Moore, *supra*, n.1.

To the extent that Iran relies on *United States v. Robinson*, 361 U.S. 220 (1960) or *Fallen v. United States*, 378 U.S. 139 (1964), to support its argument that Rule 4(a)(5) supersedes Section 2107, it has misread those decisions. They are criminal cases, and Section 2107, by its terms, applies only to civil appeals. Neither *Robinson* nor *Fallon* purports to resolve any conflict between congressionally enacted time limitations and the Federal Rules of Criminal Procedure, since there was at the time of their decision no statute comparable to Section 2107 setting forth time limits for criminal appeals. Consequently, the circumstances under which a late appeal had to be pursued under the Federal Rules of Criminal Procedure cannot be understood to undercut the viability of Section 2107.

Finally, Iran cites *Harris Truck Lines v. Cherry Meat Pickers*, 371 U.S. 215 (1962) and *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964) in support of its argument that Section 2107 is not a jurisdictional statute. These cases do not stand for that proposition—the statute is not even addressed in the opinions—and the holdings have no application to the instant case. In both of these cases, the Supreme Court refused to deprive an appellant of his right to appeal where his failure to file a timely notice of appeal was a direct result of his justifiable reliance on an order entered by the district court extending the period to appeal. Iran cannot claim that its own default was caused in this

way since it did not even ask for an extension, much less receive one, until twenty-one days after the appeal period had expired.

As a second line of attack on the viability of Section 2107, Iran suggests that Congress, through the enactment of 28 U.S.C. § 2072, delegated to the judiciary the power to promulgate rules that could supersede "mandatory and jurisdictional" requirements enacted by Congress. This argument is similarly devoid of merit. Construing an earlier version of Section 2072 that contained essentially the same language on which Iran now relies ("[a]ll laws in conflict with such rules shall be of no further force of effect . . ."), this Court held: "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction . . . ." *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941). Although Boeing and LSC discussed this authority prominently in their petition, Iran fails to offer any response to it.

In sum, Iran's defense of the Ninth Circuit's decison turns on the theory that the time requirements of Section 2107, which this Court has consistently described as "mandatory and jurisdictional," were rendered obsolete and without effect when Fed. R. App. P. 4(a)(5) was adopted. Contrary to the suggestion in Iran's brief, the conflict between the Rule and the statute is not mooted by the passage of seventeen years—particularly when Congress demonstrated the statute's continuing validity by amending it last year. A court-made rule simply cannot supersede a jurisdictional statute. By ignoring this fundamental principle, the Ninth Circuit's decision does violence to the separation of powers and paves the way for additional incursions by the federal judiciary into what has heretofore been the exclusive domain of Congress.

II. The Question of Jurisdiction is Properly Before this Court.

Iran complains that Boeing and LSC raised different jurisdictional arguments below and cites numerous cases for the proposition that arguments not raised below are heard by the Court only in exceptional circumstances. None of the cases cited by Iran in

support of this argument involve jurisdictional questions. It is well settled that the parties may raise defects in jurisdiction at any time, as may the Court *sua sponte*. *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979); *United States v. Storer Broadcasting Co.*, 351 U.S. 193, 197 (1956); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). Therefore, the issue of the Ninth Circuit's jurisdiction is properly before this Court.

III. The Ninth Circuit's Interpretation of Rule 4(a)(5) Departs From the Law in Other Circuits and Seriously Undermines the Concept of Finality.

In their petition, Boeing and LSC demonstrated that in four important ways, the Ninth Circuit's decision is a dramatic and unjustified departure from the law in every other circuit under Rule 4(a)(5). If allowed to stand, the Ninth Circuit's decision will render the heretofore strict standard of "excusable neglect" virtually meaningless, will undermine the concept of finality, and will open the doors of the already crowded appellate courts to many more tardy appellants. As Iran asserts:

> Countless extensions of time to file notices of appeal have been granted. . . ., and many more will be granted in the future.

Brief in Opposition at 4. This Court should be concerned about a published opinion of a circuit court that dilutes the standard by which these "countless" extensions of time will be measured.

Iran responds to these concerns by trying to minimize the impact of the Ninth Circuit's decision. Iran argues that the determination of "excusable neglect" is necessarily dependent on the facts of each case and is largely subjective. Iran then characterizes Boeing's arguments as mere factual disputes that simply confirm this subjectivity and should not concern this Court. This superficial assessment misses the point. Each of the four arguments presented by Boeing and LSC goes to the very heart of the legal standard for establishing excusable neglect under Rule 4(a)(5).

And Iran's response to each of these arguments confirms just how far the Ninth Circuit has strayed from the legal standard that prevails in the other circuits.

(a) **Prejudice.** Significantly, Iran does not dispute that the addition of a prejudice requirement to the excusable neglect standard is a departure from the law of this Court and the other circuits. Iran's only response is to claim that the issue of prejudice was not a factor in the Court's decision. The absence of actual prejudice, however, was the *only* basis cited by the Ninth Circuit for its finding that the second prong of the excusable neglect standard—that injustice would result if the late appeal were rejected—was satisfied.[2] Thus the consideration of prejudice was not only relevant, it was *essential* to the court's decision. This new requirement should not become part of the judicial construction of Rule 4(a)(5), but it will if the Ninth Circuit's decision is allowed to stand.

(b) **Multiple Lawyers.** Iran does not cite a single case holding that the illness of *one* lawyer for a party excuses *all* of the party's lawyers from their responsibility for filing a timely appeal. Indeed, all other cases addressing the issue of multiple counsel have required *all* counsel of record to explain why they could not file a simple one-page notice of appeal. *See* Petition at 17. Iran's only response is to misstate the record by contending that Mr. Smith was its only counsel. Mr. Smith's own words belie this conclusion. In his affadavit in support of Iran's Rule 4(a)(5) motion, he stated, "My illness . . . prevented me from realizing that local counsel in Seattle *could have been called on the telephone and requested to file the Notice of Appeal.*" (A89) (emphasis added).

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[2]The court also referred to the "near $100 million default judgment" below. If the court considered the amount of this judgment to be relevant to Iran's claim to "injustice," it was clearly wrong. Relief under Rule 4(a)(5) should obviously not turn on the size of a party's claim. Nor should the entry of an order of default have any bearing on a party's entitlement to extraordinary relief under Rule 4(a)(5). A tardy appellant's claim to such relief should not be enhanced because

Finally, Iran does not deny that it violated the district court's local rule requiring the active and informed participation of local counsel. Nor does it deny that the notice of appeal would have been timely filed if it had simply complied with that rule.[3] This case hardly presents "extraordinary circumstances" of the kind that might justify an exception to the finality rule. A party that chooses to pursue litigation through multiple counsel in separate cities should not be allowed to ignore them in the context of a Rule 4(a)(5) motion. This Court should clarify and enforce the responsibilities of multiple counsel representing a single party.

(c) **Due Diligence.** Iran concedes that its counsel waited seventeen days *after* learning of the missed deadline before taking any action to pursue a late appeal.[4] ***Iran still offers no explanation whatsoever for this delay.*** Instead, Iran advances an extraordinary legal interpretation of Rule 4(a)(5) to justify it. Rule 4(a)(5) contains an absolute cut-off of thirty days after the expiration of the appellate period. The district court may not consider a motion made after that date, no matter what the excuse proffered by the tardy appellant. Iran now asserts that this 30-day

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it refused to comply with discovery orders below and was thereby foreclosed from offering certain evidence at trial. Significantly, Iran has not contested the validity of this default order in its appeal before the Ninth Circuit.

[3]Iran's claim that Boeing was an "accomplice" to Iran's previous violation of the local rule is surprising. First, Boeing obviously had no responsibility to see that Iran, which instituted this litigation, complied with court rules. Second, the document cited by Iran, the pretrial order, was drafted by *both* parties. Local Rule 16(g) (1983). Boeing's counsel merely typed up what both parties submitted as the final version. The signature of Iran's other counsel of record would have appeared on the document only if Iran had requested it.

[4]Iran seeks to impart "good" motive to its delay before the filing deadline by contending that it was for settlement purposes. In fact the record shows that no settlement negotiations, either oral or written, took place between the parties during the relevant period (A21-22).

period is also the standard by which to measure due diligence. According to Iran, it makes no difference what a party does after learning of the missed appeal deadline. That party is free to sit on that knowledge for up to thirty days after the deadline before taking any action. Not surprisingly, Iran cites no authority for this interpretation, since it flies in the face of the letter and spirit of Rule 4(a)(5). Rule 4(a) is designed to promote finality by requiring strict adherence to the time limitations for filing an appeal. It is intended to provide an exception only rarely and only for a truly deserving appellant. It is not intended to promote delays or to reward dilatory conduct. As a matter of law, a party who, with full knowledge of his mistake, waits for seventeen days before getting around to requesting relief does not deserve exceptional relief, whatever his excuse for the prior delay. Iran's position that compliance with the 30-day requirement conclusively establishes due diligence raises a simple legal question about the meaning of Rule 4(a)(5) that should be resolved by this Court.

(d) **Good Faith.** Iran does not dispute Boeing's argument that a party without a good faith intent to pursue an appeal is not entitled to relief under Rule 4(a)(5). Rather, Iran protests that its actions in the Claims Tribunal and in the courts below were consistent with a good faith intent to preserve its rights in both forums. This argument ignores the sequence of Iran's actions. Eight days after its counsel "learned" of the failure to file a timely appeal, Iran filed a motion in the Claims Tribunal to terminate or indefinitely stay all United States proceedings in this case. Nine days later Iran finally got around to filing its request for a late appeal in the district court. Iran apparently concluded that its prospects for preventing enforcement of Boeing's and LSC's judgment would be better if appellate proceedings were pending while it moved for a stay in the Tribunal. This would give the Tribunal an actual proceeding to stay and would avoid the defense that the controversy between Boeing and Iran had become res judicata. The district court was wrong, as a matter of law, in concluding that it could not consider these facts under Rule 4(a)(5). (A18)

IV. CONCLUSION

For the reasons stated above and in their petition, Boeing's and LSC's Petition for a Writ of Certiorari should be granted. Because of the simplicity of the issues involved, petitioners suggest that summary reversal may be appropriate. *See, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).

Respectfully,

PERKINS, COIE, STONE,
OLSEN & WILLIAMS

By _____
John D. Dillow
V. L. Woolston
Counsel for Petitioners